

APPENDIX

(Department of Labor Seal)

U.S. Department of Labor

Benefits Review Board
800 K Street, N.W.
Washington, D.C. 20001-8001

BRB NOS. 95-1556 AND 96-1278

MICHAEL C. BRICKHOUSE, CLAIMANT-RESPONDENT

v.

JONATHAN CORPORATION AND
CRAWFORD & COMPANY, EMPLOYER/CARRIER-
PETITIONERS

DECISION AND ORDER

Appeals of the Decision and Order - Awarding Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor, and the Order Designating Authorized Treating Physician of B.E. Voultsides, District Director, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kelly O. Stokes (Vandeventer, Black, Meredith & Marin), Norfolk, Virginia, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order - Awarding Benefits (94-LHC-1330) of Administrative Law Judge Daniel A. Sarno, Jr., and the Order Designating Authorized Treating Physician (Case No. 5-89883) of District Director B.E. Voultsides rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant suffered a work-related injury on August 14, 1993, during the course of his employment with Tidewater Steel, a wholly owned subsidiary of employer, when a piece of steel fell on him. Claimant underwent surgery to his coccyx and has not returned to work since the date of the accident.

The facts involved in this case are not in dispute. Claimant's injury occurred at Tidewater Steel's facility in Chesapeake, Virginia. The facility sits on a 90 acre site adjoining the South Branch of the Elizabeth River. Large completed projects are shipped out by barges which dock at the facility. The building in which claimant's injury occurred is about 800 feet from the river's

edge and is divided into three bays; Bays 2 and 3 are used for steel construction for various contractors, while Bay 1 is devoted solely to employer's shipboard construction contracts. Claimant's accident occurred in Bay 3 while claimant was working on a non-maritime railroad bridge project. Claimant's overall work as a welder, however, involved both maritime and non-maritime construction. He testified that he did most of his work at the Tidewater Steel facility, but was often assigned to perform shipboard construction at other employer and Navy locations; for example, in 1993, a significant amount of claimant's work involved fabrication of flight decks for Navy ships.

The only issue before the administrative law judge was jurisdiction. In his Decision and Order, the administrative law judge found that employer's Tidewater Steel facility is bounded on one side by navigable water, and that a significant amount of the work done at the facility is maritime related. Accordingly, the administrative law judge concluded that claimant's injury occurred in an "adjoining area" under Section 3(a) of the Act, 33 U.S.C. §903(a) (1988), and that the situs requirement of Section 3(a) has thus been satisfied. The administrative law judge next found that since a significant amount of claimant's work for employer was maritime in nature, claimant established the status element under Section 2(3) of the Act, 33 U.S.C. §902(3) (1988). Accordingly, the administrative law judge found that claimant established jurisdiction under the Act and awarded temporary total disability benefits. 33 U.S.C. §908(b).

Employer filed its Notice of Appeal of the administrative law judge's Decision and Order on May 25, 1995. BRB No. 95-1556. Employer filed a second appeal

in this case on June 26, 1996; this subsequent appeal concerned the district director's Order Designating Authorized Treating Physician. BRB No. 96-1278. In an Order dated July 31, 1996, the Board consolidated these appeals, holding that, in light of the consolidation, the one year period of review provided by Public Law No. 104-134 will run from June 26, 1996. On September 3, 1996, employer moved to withdraw its appeal of the district director's order, BRB No. 96-1278. Section 802.401(a), 20 C.F.R. §802.401(a), of the Board's implementing regulations provides that at any time prior to the issuance of a decision by the Board, the petitioner may move that the appeal be dismissed. Consistent with this section, we hereby grant employer's motion and dismiss its appeal of the district director's Order Designating Authorized Treating Physician, BRB No. 96-1278, with prejudice. 20 C.F.R. §802.401(a).

Consequently, the only appeal pending in this matter is employer's appeal of the administrative law judge's Decision and Order, BRB No. 95-1556. Arguably, since employer filed a motion to withdraw the consolidated case prior to September 12, 1996, the original May 25, 1995 appeal date should apply, in which case the administrative law judge's decision could be administratively affirmed pursuant to Public Law No. 104-134, since this appeal was more than one year old on September 12, 1996. However, in view of the consolidation of the two appeals and our order stating that employer's second appeal extended the period of review until June 26, 1997, we will consider the issues raised by employer in its appeal of the administrative law judge's decision.

In its appeal of the administrative law judge's decision, employer contends that the administrative law judge erred in finding situs and status. Specifically,

employer asserts that since claimant's injury occurred in a portion of the facility devoted to non-maritime uses, claimant was not injured in an "adjoining area" under Section 3(a). Employer further argues that the status test was not met since the vast majority of claimant's work was non-maritime and he was engaged in non-maritime work at the time of his injury. Claimant responds, urging affirmance of the administrative law judge's decision.

In order to be covered under the Act, a claimant must satisfy both the "situs" requirement of Section 3(a) and the "status" requirement under Section 2(3) of the Act. See *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Section 3(a) provides that:

Compensation shall be payable under this Act . . . only if the disability or death results from an injury occurring on the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or *other adjoining area* customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a) (1988) (emphasis added.). In *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT) (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit, wherein this case arises, held that an area is "adjoining" navigable waters only if it is contiguous with or otherwise touches navigable waters. To be included as an "other area" under the Act, the area must be "customarily used by employer in loading, unloading, repairing, dismantling,

or building a vessel.” 33 U.S.C. § 903(a) (1988); *see Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10 (CRT) (4th Cir. 1996).

In concluding that claimant’s injury had occurred on an adjoining area, the administrative law judge found that employer’s Tidewater Steel facility is bound on one side by the South Branch of the Elizabeth River, and that this part of the river is navigable. Moreover, located at the facility is a dock area from which large completed projects are shipped out by barge. Lastly, the building wherein claimant was injured is only 800 feet from the river’s edge, and at least one-third of the amount of work performed at the Tidewater facility involves ship construction. *See* Emp. Ex. C. Based upon the foregoing undisputed facts, we hold that the result reached by the administrative law judge is consistent with *Sidwell*; accordingly, we affirm the administrative law judge’s determination that employer’s Tidewater Steel facility is an adjoining area within the meaning of Section 3(a) of the Act since that facility both touches navigable waters and is customarily used for vessel construction, loading and unloading.

In so holding, we reject employer’s contention that for purposes of determining situs, employer’s Tidewater Steel facility should be divided into two functioning areas, maritime and non-maritime. Employer argues that since claimant’s injury occurred in a portion of the Tidewater Steel facility devoted to non-maritime uses, situs should not be conferred. As the court stated in *Sidwell*, however, the situs inquiry is concerned with whether the parcel of land adjoins navigable waters, “not the particular square foot on that parcel upon which a claimant is injured.” *Sidwell*, 71 F.3d at 1140 n.11, 29 BRBS at 144 n.11 (CRT). Thus, situs will be

conferred, even where an injury occurs on a non-maritime portion of a facility, if the overall facility upon which claimant is injured constitutes an “adjoining area” under Section 3(a).¹

Employer additionally challenges the administrative law judge’s determination that claimant satisfied the Act’s “status” requirement. Section 3(a) defines an “employee” for purposes of coverage under the Act as “any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder and ship-breaker. . . .” See 33 U.S.C. §902(3) (1988). While maritime employment is not limited to the occupations specifically enumerated in Section 2(3), claimant’s employment must bear a relationship to the loading, unloading, building,

¹ Employer’s reliance on *Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992), and *Eckhoff v. Dog River Marina and Boat Works, Inc.*, 28 BRBS 51 (1994), is misplaced. In *Melerine*, the Board stated that situs is determined by the nature of the place of work at the moment of injury. In that case, the employee suffered an injury at a steel mill that was not used for any maritime purpose. In *Eckhoff*, whether claimant’s injury occurred on an adjoining area was not at issue; the claimant suffered chest pains while working on a pier, an enumerated situs, and at home. The Board reversed the administrative law judge’s decision to combine the pier and home into one area, and held that since claimant was injured on an area specifically enumerated in Section 3(a), the situs requirement was met. Thus, these cases are not dispositive of the issue herein. In determining whether an area is an “adjoining area” under Section 3(a), the Board looks to the nature of the place of work at the moment of injury. Accordingly, while claimant in the instant case was injured in the non-maritime bay, the nature of the Tidewater Steel facility is maritime since at least one-third of the work performed at the facility is dedicated exclusively to vessel construction.

or repairing of a vessel. *See generally Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989). Moreover, an employee is engaged in maritime employment as long as some portion of his job activities constitutes covered employment. *Caputo*, 432 U.S. at 275-276, 6 BRBS at 166. Under *Caputo*, a claimant need not be engaged in maritime employment at the time of injury to be covered under the Act, as the Act focuses on occupation rather than on duties at the time of injury. *See, e.g., Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

In determining that claimant satisfied the status requirement, the administrative law judge found that a significant or substantial portion of claimant's regular employment included maritime work. Specifically, the administrative law judge noted that claimant, in 1993, helped fabricate both flight decks and boat cab assemblies for ships, and that claimant thereafter assisted in the installation of the complete flight decks. In challenging the administrative law judge's conclusion that claimant satisfied the "status" requirement of the Act, employer contends that claimant did not routinely or regularly perform maritime activities in his position as a welder. However, our review of the record supports the administrative law judge's conclusion that a significant portion of claimant's job activities involved vessel repair and construction, enumerated occupations under the Act. As the administrative law judge found, claimant's work for employer, at the Tidewater Steel facility and other facilities, involved in large measure the fabrication of Navy and commercial vessels. *See Emp. Ex. A; Tr. At 21-22, 27*. Indeed, employer implicitly concedes that 25 percent of claimant's job duties were maritime in nature. *See Employer's Brief at 4, 11*.

Thus, the testimony and record evidence credited by the administrative law judge establishes, at the very least, that “some portion” of claimant’s job activities constituted maritime employment. *See Caputo*, 432 U.S. at 275-276, 6 BRBS at 166; *see also Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990); *Boudloche v. Howard Trucking Company, Inc.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). We therefore affirm the administrative law judge’s determination that claimant’s maritime welding duties were sufficient to confer coverage under Section 2(3) of the Act, as that finding is supported by substantial evidence and is in accordance with law. *See Schwalb*, 493 U.S. at 47, 23 BRBS at 99 (CRT).

Accordingly, the administrative law judge’s Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

/s/ ROY P. SMITH
ROY P. SMITH
Administrative
Appeals Judge

I concur:

/s/ NANCY S. DOLDER
NANCY S. DOLDER
Administrative
Appeals Judge